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COMITÉ INTERNATIONAL
DE LA
CROIX-ROUGE

I N F O R M A T I O N N O T E

- 5 -

Replies by the International Committee of the Red Cross to requests for information on the Geneva Conventions and cognate questions.

GENEVA
November 1954

I N T R O D U C T I O N

The present Information Note No. 5 is a sequel to those which were sent to all National Red Cross Societies in May and November 1952, May 1953 and May 1954.

As stated by the International Committee of the Red Cross (ICRC) in its introduction to the previous Notes, the purpose of this periodical publication is to let National Societies know of such replies by the ICRC to applications for information on the Geneva Conventions or cognate questions as it thinks may be of interest to Red Cross Societies, and of service to them in connection with their own particular problems. (1). It should also enable the Societies to inform the Government services concerned with the implementation of the Conventions as to some of the problems thereby raised and the suggestions made to settle them.

The International Committee hopes that this new issue will meet with the same favourable reception as the previous Notes. Suggestions or observations by National Societies on the present Note will again be most welcome, and will be highly appreciated.

The Committee must further draw attention to the fact that the views expressed in these Information Notes are of a provisional nature in so far as they relate to questions which will be dealt with in the Commentaries on the Geneva Conventions of 1949, which the Committee has in preparation and the first volume of which the National Societies received in Autumn 1952. Nor should the views expressed be regarded as authentic interpretations of the provisions of the Conventions, the interpretation of which is a matter resting exclusively with the States parties to these instruments in mutual consultation.

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(1) The replies are arranged under general and well established headings. Explanatory notes are inserted at the beginning in brackets, where necessary, and are accompanied by references to the Articles of the Conventions concerned.

C O N T E N T S

Page

Introduction 1

Preparation of forms for which the Conventions provide

- Identity cards for medical personnel and chaplains attached to the armed forces on land, at sea and in the air. (C.I, Art. 40; C. II, Art. 42). . . . 3

Prisoners liable to disciplinary punishments

- The disciplinary punishments which may be awarded to prisoners of war (C. III, Arts. 87 and 89) . . 5

Civil Defence

- The arming of Civil Defence forces in wartime (C. IV, Art. 63). 12

Miscellaneous

- What is a "Diplomatic Conference" ? 15

*

* *

PREPARATION OF FORMS FOR WHICH THE CONVENTIONS PROVIDE

Identity cards for medical personnel and chaplains attached to the armed forces on land, at sea and in the air (First Convention, Article 40; Second Convention, Article 42).

(In earlier Information Notes, the International Committee has already on two occasions reproduced replies dealing with the preparation of identity cards (see Information Note No.2, November 1952, p. 8, and Information Note No. 4, May 1954, p. 14). A Government which wishes to take steps to implement the Conventions of August 12, 1949, has now asked the Committee two further questions on the same subject. They are as follows :

(a) Are medical personnel and chaplains who are attached to the Air Force entitled to an identity card under Article 40 of the First Convention, in the same way as those attached to the land forces ?

(b) As the same personnel may be sometimes on land and sometimes at sea, must they be issued with two different identity cards, or will a single card suffice ?

The International Committee's reply to these two questions is given below.)

There appears to be no doubt that the provisions of the First Geneva Convention of 1949 apply not only to the land forces, but also to the Air Force. Medical and religious personnel attached to the Air Force are therefore entitled to the identity card referred to in Article 40 of that Convention. The model annexed to the Convention by way of example would appear to be perfectly suitable from the above point of view. It is intended for medical and religious personnel "attached to the armed forces", an expression which covers both the land and air forces, If it is desired to be still more specific, the following words might be inscribed at the top of the card : "for members of medical and

religious personnel attached to the armed forces on land and in the air". For States are free to introduce such modifications to the above model as they think fit.

Again, the ground covered by the First and Second Geneva Conventions is so similar, that they should be regarded as complementary to one another. Medical personnel of the land forces should be regarded as protected while at sea, and vice versa. If there are medical personnel attached to the Naval Air Arm, they could be issued with the card for which provision is made in the Second Convention. If it is desired to be absolutely precise, there is no reason why the identity card provided for under this latter Convention should not be headed : "for members of medical and religious personnel attached to the armed forces at sea and in the air".

It would, in conclusion, be perfectly possible to confine oneself to a single form of identity card for all the personnel protected under either Convention, the heading in this case reading "...attached to the armed forces on land, at sea and in the air". It would, of course, be necessary to include a reference to both Conventions in the body of the text.

PRISONERS LIABLE TO DISCIPLINARY PUNISHMENTS

The disciplinary punishments which may be awarded to prisoners of war (Third Convention, Articles 87 and 89).

(A Government which wished to bring its legislation into harmony with the Geneva Conventions of August 12, 1949, consulted the International Committee concerning an apparent contradiction in the provisions of the Third Convention dealing with penal and disciplinary sanctions. Article 87 lays down that prisoners of war shall be sentenced to the same penalties as those provided for nationals of the Detaining Power who have committed the same acts, whereas Article 89 enumerates the four disciplinary punishments or, to be more exact, the four forms of disciplinary punishment which may be awarded to prisoners of war.

There is no express stipulation regarding the relationship between these two provisions, and as a result there are two cases in which there may be some doubt as to the disciplinary punishments which are applicable to prisoners of war. The following paragraphs explain the two cases, and the solutions proposed by the International Committee.)

A. The first question is whether a Detaining Power which inflicts forms of punishments other than those enumerated in Article 89 upon its nationals, may also apply them to prisoners of war.

It will be quickly seen that in this case the answer is clearly no. Article 82, in providing for the application of the penal code of the Detaining Power, makes an express reservation in regard to proceedings and punishments contrary to the provisions of the Convention, i.e., in the case under consideration, other than the penalties enumerated in Article 89. Moreover, the strictly limitative character of this enumeration is absolutely

clear from the preliminary work (1) on the question, though it might have been brought out more clearly in the actual wording of the Article. There is thus no reason to dwell on this case, since it is evident that prisoners of war cannot be awarded punishments other than those provided for in Article 89.

B. The answer in the second case is, on the other hand, less obvious. The question is whether a Detaining Power which only applies certain of the forms of punishment enumerated in Article 89, to members of its own armed forces, must limit itself to penalties provided for in its own legislation when inflicting disciplinary punishment on prisoners of war, or whether it may, on the contrary, award the latter any of the four forms of punishment laid down in the Convention.

At first sight it would appear that the principle of equality of treatment, or parity, "clearly dominates the whole system of sanctions", as a publicist expressed it. (2) One might thus be tempted to conclude that national legislation should also have priority in the disciplinary sphere and that consequently the Detaining Power should only sentence prisoners of war to those of the punishments enumerated in Article 89, which are also provided for in its own legislation.

There are, however, various reasons which lead us, on more ample consideration, to adopt another view :

(a) In the first place, the process of development of the penal law applicable to prisoners of war should be taken into account.

The principle of equality of treatment with nationals of the Detaining Power in the matter of penal sanctions was laid down first and foremost to provide prisoners with safeguards against the application of an arbitrary penal code or arbitrary

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(1) See Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, Final Record, Vol. II-A, p.571.

(2) Jean Paquin, Le Problème des sanctions disciplinaires et pénales dans la IIIe Convention de Genève du 12 août 1949, Revue du droit international (Sottile) No. 1, 1951, p. 54.

sanctions. This principle has involved so many drawbacks, however, not only in the above connection but also in many other connections in the treatment of prisoners, that successive efforts have been made to attenuate it to a greater and greater extent.

In regard to penal sanctions, such efforts have been mainly concerned with points of procedure, in view of the difficulty of creating a special penal code for prisoners of war; (although the creation of such a code has often been considered desirable, the position of prisoners of war being very different from that of nationals of the Detaining Power).(1)

The principle of equality of treatment neverthelsss remained the guiding principle in the 1929 Convention, with the one reservation that confinement was the severest form of disciplinary punishment which could be inflicted on prisoners. But experience during the Second World War showed that this system was inadequate to protect prisoners of war against arbitrary action by the Detaining Power, and it was thought necessary to introduce modifications when revising the Convention. Hence the idea of no longer referring, for disciplinary punishments, to the Detaining Power's legislation, even with procedural safeguards, but of specifying in a limitative enumeration the forms of disciplinary punishment which may be awarded to prisoners, thus introducing the elements of an independent code in the disciplinary sphere.

This limitative enumeration thus constitutes the new and more elaborate safeguard introduced in favour of prisoners of war, and it must therefore be assumed that under the 1949 Convention the question of the forms of punishment which may be awarded to prisoners of war is essentially governed by Article 89.

(b) Consideration of Article 87, par. 1, shows that this clause should not be understood as being in contradiction with Article 89.

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(1) See Jaccard : Capture et captivité des prisonniers, Aigle 1922, p. 106; Flory, Prisoners of War, Washington D.C., 1942, p.93.

Article 87, par. 1 - which repeats a principle already formulated in the Hague Regulations (Article 8) and in the 1929 Convention (Article 46, par. 1) - should be regarded as more limited in its effect than former texts, so far as disciplinary punishments are concerned : the rule refers not so much to the forms of punishment which may be awarded to prisoners, as to their magnitude, that is to say the degree of severity of the penalty inflicted.

In support of the above view it is possible to argue, first, that when the principle of equality of treatment was, in practice, the only one governing disciplinary awards to prisoners, the rule of "the same punishment for the same acts" applied both to the nature and the degree of severity of the punishment awarded (except that the awarding of a severer penalty than that of confinement was prohibited under Article 54 of the 1929 Convention). But now that the new prisoners of war code has a special provision governing the question of the forms of disciplinary punishment, it would be unreasonable to suppose that its authors, in introducing it, had no intention of modifying the effect of Article 87 on the nature of the punishments which could be awarded.

It should, in the second place, be remembered that the rule contained in Article 87, par. 1, cannot be taken absolutely literally : even under the Hague Regulations and the 1929 Convention, the rule was limited in its application. On the one hand, prisoners of war can be prosecuted and punished for acts which are not punishable when committed by members of the armed forces of the Detaining Power - a situation which is now recognized implicitly in the second paragraph of Article 82; in such cases the prisoners do not benefit by the safeguard resulting from the principle of equality of treatment. Again, and most important, the actual situation in which a prisoner finds himself is very often different from the position of a soldier of the Detaining Power; as a result the rule of "the same punishment for the same acts" only finds its application in so far as such acts represent the constitutive elements of the same offence for both prisoners and

members of the armed forces of the Detaining Power.

Hence - and this is the third point - it is rather the spirit and the ultimate purpose of Article 87, par. 1, which must be considered. That purpose is to avoid arbitrary action in the infliction of disciplinary punishment on prisoners, both in regard to the form and the degree of severity of the punishment. The punishing authority must not inflict penalties of a different order of magnitude from those awarded to nationals of the Detaining Power, simply because the offender is a prisoner, and therefore an enemy. So far as forms of punishment are concerned, this danger of arbitrary action was eliminated by Article 89, but it still subsisted in regard to the degree of severity of the punishment awarded; the maintenance of the rule of "the same punishment for the same acts", in its ultimate sense, is thus fully justified, in order that prisoners, whatever the form of punishment awarded, should not be treated more severely than members of the Detaining Power's armed forces for similar offences (by awarding, for example, 30 days confinement to the former and only 3 days to the latter for a similar offence). (1)

(c) If we examine the problem from a more general angle - that of the protection of the prisoners, the essential object of the Convention - we find confirmation of the arguments we have just put forward for the widest possible application of Article 89 of the Convention.

It cannot be reasonably claimed that any limitation of the different forms of punishment set forth in Article 89 would contribute to the maintenance of discipline among the prisoners or make the treatment afforded them more humane. For in such case, if only one of the forms of punishment provided for in Article 89 were recognized by national legislation as applicable to members of the Detaining Power's armed forces, that form of punishment could alone be inflicted on prisoners, whatever the offence

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(1) See Actes de la Conférence diplomatique de Genève de 1929, Article 29, p. 488; see also Scheidl, Die Kriegsgefangenschaft, Berlin 1943, p. 437.

committed. In actual fact all armies throughout the world recognise the punishment of confinement (both ordinary confinement and close confinement), whereas the other punishments enumerated in Article 89 are in many cases unknown. As a result prisoners would be punished by either ordinary or close confinement - the severest of the punishments envisaged - for all offences, whereas members of the armed forces of the Detaining Power might only be liable to lighter punishments (admonishment for example).

This view also finds support in the second paragraph of Article 87, which enjoins the Courts and authorities of the Detaining Power to award punishments individually so far as possible and authorizes them to reduce the penalties provided in view of the special position of prisoners of war. This Article will be more generally applied if the authorities have a certain choice of penalties at their disposal, and are not limited to the most severe penalty, that is to say confinement - whether ordinary confinement or close confinement.

C O N C L U S I O N

It appears, in conclusion, that the question of the choice of forms of punishment which may be awarded to prisoners of war is governed by Article 89 of the Third Convention, without reference to Article 87, par. 1, but that the latter retains its full validity when it is a question of deciding the degree of severity of the penalty to be inflicted. States party to the Convention are therefore free to award prisoners any of the four punishments stipulated in that Article, but they cannot award any others. The text of the Convention does not oblige signatories to make use of all four penalties, however; they are "applicable", but need not necessarily "be applied". States are at liberty to forego one or other of them, for their own reasons.

We may point out, however, that the above interpretation of the first paragraph of Article 87 is based solely on Article 89, which only refers to disciplinary punishments. Such an interpretation is exclusively concerned, therefore, with the disciplinary field, and cannot be extended to the judicial sphere.

CIVIL DEFENCE

The arming of Civil Defence forces in wartime (Fourth Convention, Article 63).

(At the present time Civil Defence forces are being organized in many countries, their object being to safeguard the population and the national heritage from the immediate consequences of acts of war. If these Civil Defence forces form an integral part of the armed forces, their members are liable to be taken prisoners when the territory is occupied and so be unable to carry out the tasks for which they were formed. Most countries have therefore given them an exclusively civilian character, by placing them in particular under the Ministry of the Interior, thus ensuring their protection under the IVth Geneva Convention of August 12, 1949.

The task Civil Defence forces have to carry out means that they must be responsible for guarding their installations both in peacetime and wartime. They have to take action against looters, pilferers and subversive elements of all kinds, and such action will not be effective unless they are armed. We are thus faced with the following question which a Government has asked the International Committee : To what extent can a Civil Defence force of an exclusively civilian character make use of its arms without losing, in wartime, the benefits of the Fourth Geneva Convention relative to the protection of civilian persons, of August 12, 1949 ?

The International Committee's reply to the above question is given below.)

It is for each individual State to determine the categories of organizations and persons which form part of its armed forces. In certain countries, organizations for the passive defence of the population form part of the armed forces, whereas in others they are, on the contrary, of a purely civilian character. The question of whether they belong to the armed forces or not is above all a national one.

It is necessary, however, that the instructions given to organized bodies which are not part of the armed forces, should not oblige them to take part in military operations (action against enemy parachutists, for example). In certain countries the problem arises in connection with the constabulary or police force. It also arises in regard to frontier police and custom officers. In short, the civilian character of an organization depends, on the one hand, on a decision by the State, and, on the other hand, on the instructions it receives. It is, of course, also necessary for it to commit no hostile acts.

The answer to the question of whether a civilian organization for the protection of the population may place an armed guard over its installations, would appear to be that it may. It is only reasonable that an organization of this nature, which may have to act under difficult circumstances and at times when the peace of the country is disturbed, should be in a position to ensure the safety of its installations and possibly of its living quarters. It is also reasonable that the persons responsible for this task should be in possession of certain weapons, which would alone make it possible for them to ensure a real degree of security. In the same way, the local police generally have arms which they retain even when the enemy arrives.

It is quite clear, however, that the occupying authority may order such persons to be disarmed, if it considers this necessary for reasons bound up with its own security. But the fact that they were armed at the time the enemy troops arrived, cannot be held to deprive them of their civilian status. It is, for example, well-known that in the territories occupied during the last war, the Occupying Power allowed the municipal and local police to retain their fire-arms, whereas all sporting guns had to be handed in.

It is obvious in any case that a difficult practical problem may arise at the moment when the men responsible for providing this armed guard first find themselves in contact with the enemy forces. Precautions must be taken, when that moment

arrives, to ensure that the enemy has no doubts as to the civilian character of the persons with whom he has come face to face. The wisest course, under such circumstances, would appear to be for the armed guards to divest themselves temporarily of their weapons in order to avoid any possibility of confusion, or for them to demonstrate that they are civilians in some very obvious manner, especially if they wear a uniform.

May we further refer, with particular reference to the weapons with which civil defence personnel may be armed, to our remarks on the subject of the arms carried by medical personnel (see Information Note No. 4, pp. 2-4). Such personnel should thus be armed for the most part with side-arms.

The very most which could be conceded would be pistols; it does not appear advisable for them to carry rifles, as the risk of mistakes arising would then be too great. The occupying forces are, however, undoubtedly entitled to order such weapons to be withdrawn.

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In conclusion it may be mentioned that a general attempt has been made, in Article 63 of the IVth Geneva Convention, to ensure continuity in the operation of the non-military services which co-operate in the protection of the civilian population. The counterpart of this provision is certainly that such services, if they are to be recognized and continue to carry on their duties without hindrance, must abstain from anything which could associate them, directly or indirectly, with hostile acts.

MISCELLANEOUS

What is a "Diplomatic Conference" ?

(This enquiry does not strictly fall within the scope of these Information Notes, whose purpose is to deal with practical problems facing National Red Cross Societies and Governments in connection with the Geneva Conventions. The following paragraphs may, however, be found to be of general interest.)

The International Committee replied as follows to an enquiry from a private source regarding the meaning of the term "Diplomatic Conference" :

A Diplomatic Conference is a Conference of diplomatic representatives, that is to say, officials of various nationalities (or persons owing allegiance to different countries, on whom the status of representatives has been conferred by credentials made out in due and proper form), gathered together, on the initiative of Governments, to consider questions of common interest, with a view to settling them by an instrument of general significance.

A Diplomatic Conference may be distinguished, on the one hand, from the great international conferences on political problems of major interest, in which "national leaders" - foreign ministers or even sovereigns - take part (Congress of Vienna, 1815; Congress of Paris, 1856; Peace Conference, 1919), and, on the other hand, from Conferences of Experts, in which the participants are technical experts - convened either by Governments or by non-governmental organizations - whose opinions, given in an advisory capacity, in no way bind the Governments. The difference between a Conference of Experts and a Diplomatic Conference is more clear-cut than between the latter and a political conference.

The final result of a Diplomatic Conference is a general act (or final protocol), signed by all the members of the Conference and taking cognizance of the result of their deliberations.

When the latter have resulted in the drafting of an international Convention, its signature by the members of the Conference formally binds the Governments they represent (due account being taken of any reservations made at the time of signature), subject to the single condition of ratification in accordance with constitutional requirements.

The history of the Geneva Conventions provides us with a very clear illustration of the above definition of a Diplomatic Conference. The initial Geneva Convention, signed on August 22, 1864 by the representatives of 12 Governments, was the result of discussions at a Diplomatic Conference convened by the Swiss Government. That Conference had been preceded by a Commission of Experts called together in October 1863 by the Geneva Committee of Five, which had asked the War Ministers of various European States to nominate technical experts to study in common the question of assistance to the wounded on the battlefield. The Commission of Experts made a certain number of recommendations, but they were in no way binding. The Committee of Five, which had taken the name of International Committee (and was to become the International Committee of the Red Cross), wished to give these recommendations the sanction of Government approval and accordingly asked the Swiss Federal Council to issue invitations to Governments for the purpose of negotiating and signing an international Convention on the subject.

The Conference opened in Geneva in August 1864 with 25 delegates, representing 15 European Powers and the United States of America. There were only a few diplomats (representing Spain, the United States, France, the Netherlands, Russia and Switzerland) among their number, the other delegates being members of army medical services. The French and Swiss delegates were alone in possession of the plenipotentiary powers which would enable them to sign a Convention. Fearing that under such circumstances the Conference might fail, M. Jaegerschmidt, the French delegate, with the agreement of General Dufour, President of the Conference, requested that his credentials should be read aloud

by the Secretary. He explained the fact that most of his colleagues had no such credentials as being due to a misunderstanding, advised them to telegraph to their respective Governments to ask for plenipotentiary powers, and suggested that pending receipt of the replies the Conference should proceed with the consideration of the Draft Convention prepared by the International Committee. His suggestion, which had the support of all the diplomats among the delegates, was enthusiastically adopted by the Conference. Within a few days, by the time consideration of the Draft had been completed, the delegates had almost all received their credentials and it was possible for the Geneva Convention to be signed.

That precedent was to be of great importance as an encouragement and model for various Conferences convened since that time to draw up the International Conventions, which, together with the Red Cross Conventions proper, at present constitute positive humanitarian law. All such Conferences have been Diplomatic Conferences in the sense that they were convened on the initiative of Governments, were composed of Government delegates provided with plenipotentiary powers, and resulted in the elaboration of international Conventions. The latest of these Conferences were the Diplomatic Conference of Geneva, which resulted in the four Geneva Conventions of August 12, 1949, and two Diplomatic Conferences, or Conferences of Plenipotentiaries, convened under the auspices of the United Nations, the first of which produced a Convention relating to the status of refugees (Geneva, July 2-25, 1951) and the second of which (New-York, September 13-23, 1954) regulated the status of stateless persons.

Message No. 5722 of December 5, 1949 from the Swiss Federal Council to the Federal Assembly concerning the approval of the Geneva Conventions of August 12, 1949, contained many examples of the term "Diplomatic Conference", used in the sense defined above.

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